

FILED
COURT OF APPEALS
DIVISION II

2018 OCT 31 PM 1:04

STATE OF WASHINGTON

BY MS
DEPUTY

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) CAUSE #51897-0-II
Respondent,)
V.) STATEMENT OF ADDITIONAL
SOPHEAP CHITH) GROUNDS FOR REVIEW
Appellant.)

I, Sopheap Chith, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in my brief. I understand the Court will review the Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUNDS FOR REVIEW

1.) Did failure to give the TONGATE jury instructions where a weapon was never recovered and the State has a burden of proof where the State must instruct the jury that the separate deadly weapon and firearm enhancement finding must be proven beyond a reasonable doubt, as required in TONGATE, violate the 6th Amendment?

2.) Defendant has faced the State Court in a extreme disadvantage, suffering prejudice in heretofore unseen proportions; submitted to multiple punishments for the same offense... So does multiple charges and multiple punishments violates his 5th and 14th Amendments?

ADDITIONAL GROUND ONE:

1a.) State v. Pam, 30 Wn. App. 471 (1981) failure to give TONGATE instructions where a weapon never recovered or fired was an error. State v. Tongate, 93 Wn.2d 757 (1980) instructions as to the State burden of proof. State must instruct the jury that the separate deadly weapon and firearm findings must be proven beyond a reasonable doubt as required by TONGAGE.

Under RCW 9.95.040, the State must prove the presence of a deadly weapon IN FACT in order to present a special finding that the defendant was armed with a deadly weapon. A defendant's penalty cannot be enhanced if the evidence established only that he was armed with a gun-like, but non-deadly object. State v. Tongate, (659 P.2d.457) supra. Under RCW 9.41.025, the State must prove the presence of a firearm which is defined under WPIC 2.10 as a weapon from which a projectile may be fired by an explosive, such as gun powder (see exhibit (1) jury instruction #16). A gun like object incapable of being fired is not a firearm under this definition.

An error infringing upon a defendant's constitutional right's is presumed prejudicial, and the State has the burden of proving it was harmless. State v. Fowler, 144 Wn.2d 59 (1990) 9-0 win State v. Recuenco, 154 Wn.2d (2005) firearm with deadly weapon enhancement.

State v. Pierce, 155 Wn. App. 201, 230 P.3d 237 (2010). The Pierce Court also partially rejected the State's argument that it need not produce and test a weapon in order to support a firearm enhancement, stating;

This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robb-

ery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement, where proof of operability is required. Id. at 714 n.11 (citing Recuenco, 163 Wn.2d. at 437; PAM, 98 Wn.2d. at 754-55.

Defendant has forced a jury that seen very conflicting testimony as a firearm possession, assault with a firearm, and a firearm enhancement that when taken as a whole, leaves one wondering "where's the beef?"

There was no GSR, there was NO GUN FOUND, there was no shell casing found, there was no bullet holes found, there was no muzzle flash sighted or testimony to same, but there was conflicting witness statement's and State's professional witness apprehended defendant almost immediately.

Defendant was intimidated by counsel into not testifying about "TOY PISTOL" which shattered to pieces when he threw it from the vehicle.

This deprive defendant of a fair presumption of innocence, by State, Court, jury, and counsel, to be adjudicated with "facts", not presumptions in determining whether defendant was guilty or innocent, beyond a reasonable doubt.

ADDITIONAL GROUND TWO

The double jeopardy clause of the U.S. Const. provide that no individual shall "be twice put in jeopardy of life or limb" for the same offense, U.S. Const. Amend.5.

The 5th Amend. Double Jeopardy protections is applicable to the State's through the 14th Amend. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969).

The Washington Constitution provide that NO individual shall "be twice put in jeopardy for the same offense" Washington Const. Article I Section 9. This Court gives

article I section 9 the same interpretation as the U.S. Supreme Court gives the 5th Amend. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The double jeopardy clause protects against 1) a second prosecution for the same offense after acquittal 2) a second prosecution for the same offense after conviction 3) multiple punishments for the same offense. North Carolina v. Dearce, 395, U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969).

To determine if separate prosecutions violates the double jeopardy prohibitions the Courts utilize the "BLOCKBURGER" or "same elements" test.

In State v. Recuenco, 154 Wn.2d 156, 162-3, 160 P.3d 188 (2005) the Washington Supreme Court held that facts to support a firearm enhancement must be proved to a jury. Like the aggravating factors in RING, the additional finding increases the punishment faced by the defendant and so separates as the functional equivalent of an element of a greater offense. Because under BLAKELY and APPRENDI factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new greater offense for the purpose of double jeopardy. There is "no principled reason to distinguish" between statutory elements of the crime- which in this case included possession of a "deadly weapon", and the statutory firearm enhancement which again punishes for the same findings, possession of a "deadly weapon".

Defendant Sopheap Chith was charged with assault in the second degree (count I) [RCW 9A.36.021(1)(c)], violation of a order (count VIII) [RCW Chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50 or RCW 26.52.020], and taking motor vehicle without permission in the first degree (count IX) [RCW 9A.56.020(1)], these charges were elevated to a higher degree by the element of being armed in committing the

crime. Defendant Sopheap Chith is also charge with unlawful possession of a firearm in the second degree (count IV) [RCW 9.41.010 and RCW 9.41.040 (2) (a)] used the same element of being armed in committing this crime.

Therefore again elevating the crime for the same underlining act, use of a firearm which violates double jeopardy. This Court should reverse and remand with the direction that the firearm enhancement be vacated SEE: State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

APPRENDI, BLAKELY, RING, RECUENCO, and any fact that increase the maximum penalty imposed upon a criminal defendant is acting to an element of the crime and must be proven to the jury beyond a reasonable doubt. Since a deadly weapon enhancement is the "factional equivalent of an element", it is now clear that RCW 9.94A.602 codifying that enhancement - increases the maximum sentence over the BLAKELY statutory maxium.

CONCLUSION FOR RELIEF

Based on the above issues, this Court Should vacate all firearm enhancement or alternatively Reverse and Remand this case to the proper Court for a full new trial.

Respectfully submitted this 25th day of Oct., 2018.



Sopheap Chith #374950
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Wa 98520

EXHIBIT(1)
(JURY INSTRUCTION #16)

26222 11/20/2013 80178

Case Number: 13-1-00554-1 Date: June 16, 2017

SerialID: 253A22AA-9160-40F3-9F817C8CFF5F1986

Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 16

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 25th, 2018, that this statement of additional grounds was sent by mail to Derek M. Byrne, Clerk of the Court, Court of Appeals, 950 Broadway, Ste. 300, Tacoma, Wa 98402-4454, and Michelle Hyer, Pierce County Prosecutor and Appellant Counsel Peter B. Tiller and copies were mailed by U.S. mail, postage prepaid, to the following:

Derek M. Byrne	Michelle Hyer
Clerk of the Court	Pierce County Prosecutor
Court Of Appeals	930 Tacoma Ave. S. RM 946
950 Broadway,	Tacoma, Wa 98402-2102
Ste.300	
Tacoma, Wa 98402-4454	

The Tiller Law Firm
Corner of Rock and Pine
P.O. Box 58
Centralia, Wa 98531
LEGAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Stafford Creek Corr. Center in Aberdeen, Washington on October 25th, 2018.

Sopheap Chith

